



**Judiciary Committee Approves
Constitutional Amendment to Protect the Flag
July 20, 2004**

Washington, DC – The Senate Judiciary Committee today approved a resolution that would allow for a constitutional amendment to authorize Congress to enact legislation protecting the American flag. The resolution was sponsored by U.S. Senators Orrin Hatch (*R-Utah*) and Dianne Feinstein (*D-Calif.*) and co-sponsored by 55 other Senators.

Following is the prepared statement of Senator Feinstein for today's Committee vote:

“Mr. Chairman, thank you for your commitment to this resolution, a proposed amendment to the Constitution that I have supported since the 104th Congress. This resolution would allow for a constitutional amendment to allow Congress to enact legislation to protect the flag.

S.J. Res. 4 would not ban flag burning. It would not ban flag desecration. This amendment would do one thing only: give Congress the opportunity to construct, deliberately and carefully, precise statutory language that clearly defines the contours of prohibitive conduct.

Simply put, this amendment would give Congress the right to do what it was able to do before 1989 when the Supreme Court decided that a state statute prohibiting desecration of the American flag was unconstitutional.

At the outset, let me say that amending the Constitution is serious business, indeed. I know that, and I know we need to tread carefully. The Constitution is, after all, democracy's sacred text. But the Constitution is also a living text. As originally conceived, it had no Bill of Rights. In all, it has been amended 27 times.

If the Constitution is democracy's sacred text, then the flag is our sacred symbol. If the flag had no symbolic value, we would not get chills when we see it lowered to half-mast or draped on a coffin. We wouldn't feel so much pride when we see it flying in front of our homes or at our embassies abroad.

I wonder, is there any of us who can forget that wonderful Joe Rosenthal photograph of the six Marines hoisting that flag on the barren crag of Mount Suribachi, after the carnage at Iwo Jima, where over 6,800 American soldiers were killed. There has been no photograph I know of that so endures in our mind's eye, that has carried so much symbolism, as that one. I remember seeing it because the San Francisco Chronicle ran it

on the front page during World War II. I was just a small child, but from that point on, I knew the flag was something special.

And I was again reminded of our flag's significance after the horrific attacks on the World Trade Center on September 11, 2001. When firefighters Dan McWilliams, George Johnson, and Billy Eisengrein raised the American flag at Ground Zero it symbolized an entire nation pulling together in the face of tragedy. That photograph ran in thousands of newspapers, on the Internet, and on network television -- an image which will forever be identified with 9/11. It immediately drew comparisons to the photo of Marines raising the U.S. flag at Iwo Jima during World War II. To this day, those images remain etched deeply in the minds of so many Americans and, indeed, so many people around the world.

People speak metaphorically about the fabric of our society and how it has become frayed. I submit that in a very real sense, our flag is the physical fabric of our society, knitting together disparate peoples from distant lands, uniting us in a common bond, not just of individual liberty but also of responsibility to one another. As such, the flag is more precious to us, perhaps, than we may even know.

Constitutional scholars as diverse as Chief Justices William Rehnquist and Earl Warren and Associate Justices Stevens and Hugo Black have vouched for the unique status of the national flag. In 1974, Byron White said:

‘[T]here would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial or to prevent overlaying it with words or other objects. The flag is itself a monument, subject to similar protection.’ [Smith v. Goguen, 415 U.S. at 587 (1974)]

I could not agree more with the opinion of Justice White: “The flag is itself a monument, subject to similar protection.” Since that time, unfortunately, a narrow majority of the Supreme Court has now ruled twice that this great symbol of our national unity is not protected under the Constitution. So that is why we are here today, to begin the process of protecting the flag, which is a symbol of all the protections we are afforded as Americans and all the liberties we enjoy. The flag is, simply put, a monument to everything America represents. It should be protected as such.

Our history books are replete with stories of American soldiers who were charged with the responsibility of leading their units into battle by carrying our Nation's flag. To them, it was more than a task, it was an honor worth dying for, and many did. When one soldier would fall, another would take his place, raise the flag, and press forward. They would not fail. Their mission was too important, the honor too great, flag and country too respected to give anything short of the last full measure of their devotion, their lives, to succeed.

Moreover, our flag is recognized as unique not only in the hearts and minds of Americans but in our laws and customs as well. No other emblem or symbol in our Nation carries with it such a specific code of conduct and protocol in its display and handling.

For example, Federal law specifically prescribes that the flag should never be displayed with its union down, except as a signal of dire distress or in instances of extreme danger to life or property. When a flag is flown upside down, it is in fact a signal of distress. The U.S. flag should never touch anything beneath it: neither ground, floor,

water, or merchandise. The U.S. flag should never be dipped to any person or thing. And the flag should never be carried horizontally but should always be carried aloft and free.

Why, then, should it be permissible conduct to burn, to desecrate, to destroy this symbol, this emblem, this national monument? That is not my definition of free speech.

For the first two centuries of this Nation's history, that was not the Supreme Court's definition of free speech either. In fact, until the Court's 1989 decision in *Texas v. Johnson*, 48 of the 50 States had laws preventing burning or otherwise defacing our flag.

As I said at the outset, I don't take amending the Constitution lightly. But when the Supreme Court issued the *Johnson* decision and the subsequent *United States v. Eichman* decision [496 U.S. 310 (1990)], those of us who want to protect the flag were forced to find an alternative path.

In the *Johnson* case, the Supreme Court, by a 5-4 vote, struck down a State law prohibiting the desecration of American flags in a manner that would be offensive to others. The Court held that the prohibition amounted to a content-based regulation. As a result, the Texas statute could not survive the strict scrutiny required by legal precedent, so the Court struck it down.

After the *Johnson* case was decided, Congress passed the Flag Protection Act of 1989. That Act prohibited all intentional acts of desecrating the American flag and was, therefore, not a content-based prohibition on speech or expression. Nevertheless--and this is the point why a statute won't do--another narrow majority of the Supreme Court acted quickly to strike down the Federal statute as well, ruling that it suffered the same flaw as the Texas statute in the *Johnson* decision and was consequently inconsistent with the First Amendment. That 5-4 decision makes today's discussion necessary.

I support S.J. Res. 4 because it offers a way to return the Nation's flag to the protected status it deserves.

I also believe the amendment is consistent with free speech. I disagree with those who say we are making a choice between trampling on the flag and trampling on the first amendment. Protecting the flag, circumscribing certain conduct, will not prevent people from expressing their ideas through other means in the strongest possible terms.

I support this amendment because I believe flag burning is content, not speech, and can be regulated as such. But to my friends who would argue otherwise, I remind them that even the right to free speech is not unrestricted. For example, the Government can prohibit speech that threatens to cause imminent tangible harm, or shouting "fire" in a crowded theater. Obscenity and false advertising are not protected under the first amendment, and indecency over the broadcast media can be limited to certain times of day.

I recognize that by supporting a constitutional amendment to protect the flag, I am choosing a different course from many of my fellow Democrats in Congress and, quite frankly, from many of my close friends for whom I have the greatest respect. But my

support for this amendment reflects my broader belief that the time has come for the Nation to begin a major debate on its values. We need to ask ourselves what we hold dear--is there anything upon which we will not cast our contempt?

How can we foster respect for tradition as well as ideological diversity? We must not advance one value at the expense of another.

The framers of the Constitution recognized two important elements in our constitutional tradition--liberty and responsibility. Without responsibility, without the rule of law, there could be no protection of life, limb, or property--there could be no lasting liberty. I believe there is a danger in moving too far in either direction--toward too restrictive order, or toward unfettered individual liberty.

The key is the balance. In this instance, I believe we cannot tilt the scales entirely in favor of individual rights when there exists a vast community of people in this country who have gone to war for our flag.

There are mothers and fathers, wives, husbands, and children who have received that knock on their front door and have been told their son or daughter, husband or wife, father or mother has been killed in the line of duty. They have been given a flag on this occasion, a flag which helps preserve the memory of their loved one and which speaks to his or her courage. We have seen this ceremony of military personnel giving an American flag to the families for all of our fallen soldiers in Iraq. That is the symbol, that is the emblem, that is the national monument.

And let us not forget the poignant images of Nancy Reagan as she was given a flag at the burial of her husband, President Ronald Reagan. The flag provided comfort not only to Mrs. Reagan but to countless Americans who grieved President Reagan's death.

Requiring certain individuals to stop defacing or burning the flag, I think, is a very small price to pay on behalf of millions of Americans for whom the flag has deep personal significance.

Less than a decade ago, when 48 States had laws against flag burning, there was no less free speech. And if this amendment is adopted, the First Amendment will continue to thrive. I believe S.J. Res. 4 will protect the integrity of the flag and keep our First Amendment jurisprudence intact.

Some in the past have offered federal statutes as a way to protect the United States flag. But given what the Supreme Court said in *Johnson* and *Eichman*, no statute could survive under those decisions. So we cannot overrule such a notion with a statute. That is why, clearly and simply, we need a constitutional amendment. And that is why I stand today to support that amendment."

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